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No. 90-68

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EDDIE S. YLST, Warden,

Petitioner,

vs.

OWEN DUANE NUNNEMAKER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the rule in *Harris* v. *Reed*, 489 U. S. 255 (1989), does a state high court's summary denial of a habeas corpus petition forgive a procedural default claimed by an intermediate appellate court on direct review?

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest.

CJLF seeks to bring the constitutional protection of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. CJLF has received written consent from both parties to file the brief.

The present case involves a decision by the Ninth Circuit Court of Appeals, which, if left standing, would hamstring procedural default. It would effectively eliminate an important tool for states to enforce their procedural rules in criminal cases. It would result in the relitigation on federal habeas corpus of cases already correctly decided by the state courts. Such relitigation is thus contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

On May 31, 1975, defendant, armed with an automatic weapon, forcibly entered the home of his estranged wife. After a struggle with his wife, defendant fired one shot from approximately three feet away, mortally wounding her. Petition for Certiorari ("Pet.") 8-9. Defendant prevented witnesses from summoning help, cutting the telephone cord to keep anyone from calling for an ambulance. *Id.*, at 9. The murder was committed in the presence of at least two of the couple's foster children. See *id.*, at 9.

On January 30, 1976, a jury found defendant guilty of murder in the first degree and found that he was armed with and used a deadly weapon in the commission of the offense. *Id.*, at 6. On June 30, 1978, the California Court of Appeal for the First Appellate District, in an unpublished opinion, modified and affirmed the conviction. *Id.*, at 7 and Appendix C. The court of appeal, in reaching its decision, found that defendant was procedurally barred from raising a *Miranda* issue for the first time on appeal. *Id.*, at 12-13. On September 27, 1978, the California Supreme Court denied defendant's petition for hearing. *Id.*, at 7.

During 1985 and 1986 defendant filed numerous petitions for habeas corpus in the Sonoma County Superior Court, the Court of Appeal, and the California Supreme Court. These petitions were summarily denied. *Ibid.*

On November 12, 1987, defendant filed a habeas corpus petition in the federal district court. The petition was denied on December 9, 1988. *Id.*, at 8. The Ninth Circuit Court of Appeals reversed part of the judgment of the district court, finding that defendant's *Miranda* claim was not procedurally barred in spite of the express finding of procedural default by the California Court of Appeal. *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1204 (9th Cir. 1990).

SUMMARY OF ARGUMENT

Procedural default is derived from the principles of comity and finality. These principles should not be subverted by a blind application of *Harris* v. *Reed*, 489 U. S. 255 (1989).

Requiring the California Supreme Court to make a finding of procedural default whenever it dismisses a habeas corpus petition places too great a burden on the resources of California's high court. The California Supreme Court has a very large docket and must be able to summarily deny habeas petitions without perusing them for procedural default. If the court cannot apply the Ninth Circuit's holding, then California will not be able to enforce its procedural rules in criminal cases.

The summary denial of a habeas petition by the California Supreme Court is only a decision not to exercise discretionary jurisdiction over a prisoner's claim. It is analogous to this Court's summary denial of original habeas petitions and writs of certiorari. As the California Supreme Court's summary denial of a habeas petition means nothing more than that the court decided not to hear a particular case, the denial is not a judgment under *Harris*.

Even if the decision of the California Supreme Court was more than a decision not to take jurisdiction over the case, it still is not a judgment under *Harris*. *Harris*, like *Michigan* v. *Long*, 463 U. S. 1032 (1983), was concerned with ambiguous findings of independent state grounds. As there was a clear, uncontradicted finding of procedural default by the California

Court of Appeal in the present case, there is no ambiguity for *Harris* to deal with. Thus *Harris* should not be used to invalidate the findings of procedural default by the California Court of Appeal.

ARGUMENT

I. The Ninth Circuit's decision subverts procedural default and the principles it protects.

The Ninth Circuit held that the State of California could not raise a procedural default to bar defendant's *Miranda* claim because the California Supreme Court did not "expressly state its reliance on Nunnemaker's procedural default when denying his final habeas petition." *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1204 (9th Cir. 1990). This threatens the constitutional balance between state and federal courts under the federal structure. It ignores an explicit finding of procedural default by the California Court of Appeal, Pet. 12, and places an intolerable burden of compliance on the California Supreme Court.[2]

> "[T]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 263 (1973) footnote omitted (Powell, J., concurring).

Justice Powell's observation continues to ring true 17 years later. This case is another example of the denigration of state

2. See Part I. B., *infra*, at 7-14.

courts by some of the lower federal courts in habeas corpus actions.

A. Interests preserved.

Procedural default protects many interests. The common theme of these interests is protecting state judiciaries from undue interference by federal courts. Federalism is one of the most important interests protected by the Constitution.

> "[I]t would surely be shallow not to recognize that the structure of our political system accounts no less [than the Bill of Rights and the Fourteenth Amendment] for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bureaucracy continues to grow." Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A. B. A. J. 943-944 (1963).

Without procedural default a state would be unable to enforce its own procedural rules. If a criminal defendant can raise a procedurally defaulted claim in federal court, then the state can impose no meaningful sanction to require defendants to comply with its rules of procedure. Therefore, federal courts must respect the procedural default findings of state courts to maintain an orderly administration of justice. See *Reed* v. *Ross*, 468 U. S. 1, 10-11 (1984); *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982).

Another key interest served by procedural default is comity. This Court has long recognized that state courts deserve the opportunity to finish litigating a defendant's claims before

having their judgments reviewed by federal courts in habeas corpus. See *Ex parte Royall*, 117 U. S. 241, 252 (1886). Allowing procedurally defaulted claims to be heard in federal court would undermine those interests.

> "In that situation, the trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum. The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle*, *supra*, 456 U. S., at 128-129.

Procedural default also protects the finality of state judgments. Successful enforcement of state procedural rules will put more focus on the trial and the initial appeal. By being forced to raise all issues at these early stages, a criminal defendant can obtain an acquittal or early reversal, or if he is unsuccessful and is convicted, he will have fewer claims to assert in his federal habeas petition. See *Wainwright* v. *Sykes*, 433 U. S. 72, 88-89 (1977); *Reed*, *supra*, 468 U. S., at 10-11. Preserving the finality of state judgments is important because a later review of a defendant's claims can bring serious problems. "[E]vidence may no longer be available to evaluate the defendant's constitutional claim if it is brought to federal court long after his trial; and it may be too late to retry defendant effectively if he prevails in his collateral challenge." *Reed*, *supra*, 468 U. S., at 11. The problem of retrying defendants after successful collateral attack is one of the greatest costs associated with the Great Writ. *Engle*, *supra*, 456 U. S., at 127-128.

The procedural default rule, like all other limits on a federal court's habeas corpus jurisdiction, is designed to preserve federalism. Preserving finality, giving state courts the first opportunity to litigate claims, and helping states enforce their procedural rules all help preserve the power of state courts against the intrusions of habeas corpus. Maintaining the integrity of the state judiciary is an essential component of habeas corpus. See *Reed*, *supra*, 468 U. S., at 10. When every

decision a state court makes is subject to perpetual second-guessing by federal courts, it will be very easy for state judges to become alienated from their duties.

> " 'I could imagine nothing more subversive of a judge's sense of responsibility of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.' " *Schneckloth*, *supra*, 412 U. S., at 264-265 (Powell, J., concurring) (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963).

State courts are not the vassals of the federal judiciary under habeas corpus. They are independent bodies which do the job of providing the bulk of our nation's criminal adjudication. See *Michigan* v. *Long*, 463 U. S. 1032, 1042, n. 8 (1983). The founders understood the importance of state courts when they gave the federal judiciary limited, enumerated jurisdiction. See U. S. Const. art. III, § 2; *The Federalist* No. 82 (A. Hamilton). The procedural default rule must be interpreted with the interests of federalism in mind. Allowing procedural default to derogate the powers of state courts runs the risk of federal tyranny that so worried Justice Harlan. See Harlan, *supra*, 49 A. B. A. J. at 943-944.

B. Interests destroyed.

The Ninth Circuit did not attempt to preserve state interests in the present case. "[I]t has long been recognized as the very essence of federalism that the states should have the widest latitude in the administration of their own systems of criminal justice." *Hoag* v. *New Jersey*, 356 U. S. 464, 468 (1958). The ruling below shows no appreciation for the needs of state court systems or the strain it would place on their resources. If upheld, it would be nearly impossible for California to enforce its procedural rules in criminal cases. This derogation of a state's criminal justice system is the antithesis of what the procedural default rule is intended to accomplish

and provides compelling justification for reversal in this case.

The California Supreme Court is a very busy place. It is the highest court of our largest state, encompassing over 28,000,000 people in its jurisdiction. U. S. Bureau of the Census, *Statistical Abstract of the United States 1990* (110th ed.) at 20. To deal with this many people, California has developed a large and sophisticated judiciary. California has 218 courts with 1,555 authorized judgeships. 2 Judicial Council of California, *1990 Annual Report*, at 19 (1990). During the fiscal year 1988-89 over 11 million cases were filed, excluding parking violations. *Ibid.* This system costs California taxpayers $1.3 billion dollars to maintain, not including capital outlays. *Ibid.* All of this is overseen by the California Supreme Court.

The duties of the California Supreme Court in overseeing this system are substantial. The Supreme Court, courts of appeal, and superior courts "have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." Cal. Const. art. VI, § 10. California's high court also has exclusive appellate jurisdiction whenever a death penalty has been pronounced. *Id.*, § 11. Mandatory appellate jurisdiction also extends to decisions of the Public Utilities Commission, Cal. Pub. Util. Code §§ 1756, 1759. The state high court oversees all bar discipline matters. See Cal. Bus. & Prof. Code §§ 6082, 6084. Finally, the Supreme Court has the jurisdiction to review the decisions of the intermediate courts of appeal. Cal. Const. art. VI, § 12 subd. (b).

The California Supreme Court's docket is commensurate with its responsibilities. In the fiscal year 1988-89, 4,251 cases were filed before it, and the court disposed of 4,488 cases. See 2 Judicial Council, *supra*, at 24. By comparison, this Court, at the conclusion of the 1989 October term, docketed 5,746 cases, 59 U. S. L. W. 3064 (July 7, 1990), and disposed of 4,908 of them. *The Supreme Court, 1989 Term*, 104 Harv. L. Rev. 40, 363 (1990).

In addition to having a docket almost the size of this Court's, the California Supreme Court has greater mandatory

jurisdiction requirements than this Court. This Court is required to take relatively few cases. It has original and exclusive jurisdiction only over "all controversies between two or more states." Even that jurisdiction is not fully mandatory in practice. See *Maryland* v. *Louisiana*, 451 U. S. 725, 761 (1981) (Rehnquist, J., dissenting). In the October 1989 term, only 14 of these cases were on this Court's docket, 13 of which were hold-overs from the previous term. 59 U. S. L. W. 3064. This Court's mandatory appellate jurisdiction has been limited by Congress to review of decisions of the rarely convened special three-judge district court tribunals. See 28 U. S. C. § 1253, P. L. 100-352, 102 Stat. 662 (1988); see also 28 U. S. C. § 2284 (three-judge court for apportionment cases).

The mandatory jurisdiction of the California Supreme Court, however, includes all appeals from death penalty judgments. Cal. Const. art. VI, § 11. These cases place great pressure on the Court's resources. In the fiscal year 1988-89, it took 37 new death penalty appeals and disposed of 46 death penalty cases from its docket. 2 Judicial Council, *supra*, at 24. These cases are the most complicated cases an appellate court can receive, raising many issues under the complex jurisprudence of capital punishment. As much as 20 percent of the court's time is devoted to these cases. Kaufman, *Crisis in the Courts*, California Lawyer 28, 30 (August 1990).

Viewed in context of the demands placed on the California Supreme Court, the problems with the Ninth Circuit's opinion below reveal themselves. In fiscal year 1988-89, 1,005 original habeas corpus petitions were disposed of by the California Supreme Court. 2 Judicial Council, *supra*, at 24. The overwhelming majority of these petitions were summarily denied. The California Supreme Court issued only 120 opinions in 1988-89. *Id.*, at 27. Furthermore, only 97 extraordinary writs of all sorts, including certiorari, mandamus, and habeas corpus were issued in 1988-89 out of a total of 1,210 applications for such writs. *Ibid.* Thus, by any measure, the bulk of habeas petitions were summarily denied by the California Supreme Court. Given the volume of habeas petitions dismissed, there is little doubt that the dismissals do not go to the merits, but rather are decisions that the issues raised do not merit

Supreme Court review and are properly entrusted to the lower courts.[3] Cf. *Brown* v. *Allen*, 344 U. S. 443, 491 (1953).

The Ninth Circuit's opinion would require the California Supreme Court, in order to preserve procedural default, to deny a habeas petition with a one line order denying relief for procedural default. *Nunnemaker*, *supra*, 896 F. 2d, at 1204. During 1988-89 this would have required the California Supreme Court to scour each of the 1,005 habeas petitions it disposed of to decide which of the many issues raised should be indicated as denied on procedural default grounds. After looking for procedural default, the justices of the California Supreme Court would have to agree whether procedural default existed for each petition. Getting the members of a high court to agree on the reasons for a summary denial will be a daunting task. See *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (Frankfurter, J., dissenting).[4]

The problem of finding procedural default is compounded by the fact that most habeas petitions will contain a mix of claims which are and are not procedurally defaulted. One example is defendant's federal habeas petition in the present case. The District Court found that defendant's Fifth and Sixth Amendment claims were procedurally barred, but it addressed the merits of his ineffective assistance of counsel claim. *Nunnemaker*, *supra*, 896 F. 2d, at 1202. These claims were also made to the California Supreme Court in defendant's second habeas petition. *Ibid*. As it is likely that a procedurally defaulted claim will bring up a charge of ineffective assistance of counsel to excuse the default,[5] many petitions will contain mixed claims.

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3. See *infra* at 11.

4. For a more extensive analysis of the problem of getting a court to agree on a reason for summary denial, see part II., *infra*, at 19-20.

5. See, *e.g.*, Petition for Certiorari in *Coleman* v. *Thompson*, No. 89-7662, question 3.

A conscientious court, when making a statement of procedural default, would indicate only those claims that were procedurally defaulted. The statement that the Ninth Circuit would have the California Supreme Court make ("relief is denied for reasons of a procedural default") would be inaccurate. *Id*., at 1204 (quoting *Harris* v. *Reed*, 489 U. S. 255, 265, n. 12 (1989)). The California Supreme Court would have to say that only the Fifth and Sixth Amendment claims were barred. Thus the decision below would require the California Supreme Court to work through the nearly 1,000 original habeas petitions it dismisses each year, find which ones contain procedural default claims, and list which claims are procedurally defaulted. When a court must list its reasons for summary denial, the denial takes on most of the characteristics and time requirements of an opinion. See *Darr*, *supra*, 339 U. S., at 227-228 (Frankfurter, J., dissenting). No court as busy as the California Supreme Court can stand up to such a workload.

Another effect of this opinion will be to increase the number of habeas petitions in the California Supreme Court. The Ninth Circuit's decision encourages a war of attrition between prisoners and the California judiciary. The California Court of Appeal had made an explicit finding of procedural default. Pet., Appendix C, at A-41. Yet when the California Supreme Court did not issue a finding of procedural default in defendant's successive petition, the statement by the Court of Appeal became void. Thus, under the Ninth Circuit's opinion, a prisoner who had lost a claim due to procedural default in an opinion of a California court would have an interest in filing as many habeas petitions as he can with the California Supreme Court. As soon as one summary denial came without any statement, all previous procedural default findings would be eradicated. This potential abuse can only add to the burdens on the California Supreme Court.

Given the great burdens this decision places on the California Supreme Court, it is unlikely that it will be able to comply with the Ninth Circuit's dictates. In addition to the practical problems with compliance, the California Supreme Court is not the body most interested in preserving a defendant's procedural default. The California Attorney General's

Office is the branch of California's government entrusted with preserving convictions. See Cal. Const. art. V, § 13. Therefore, that office, not the state Supreme Court, will be the agency most interested in preserving the finality of convictions by enforcing the procedural bar rule. The California Supreme Court is simply an impartial arbiter between defendant and the People. While a court has an interest in seeing its procedural rules obeyed, see, *e.g.*, *Davis* v. *United States*, 411 U. S. 233, 241 (1973), it is up to the Attorney General to protect these rules in federal court.

The decision below is based on dicta. In a footnote, the *Harris* Court addresses the threat of a "flood of improper prisoner petitions" in light of the court's decision. *Harris*, *supra*, 489 U. S., at 265, n. 12. The footnote stated that this problem could be avoided by "a one-line *pro forma* order" stating " 'relief is denied for reasons of procedural default.' " *Ibid.* The Ninth Circuit used this statement to fashion its holding. *Nunnemaker*, *supra*, 896 F. 2d, at 1204.

This footnote is obiter dicta. *Harris* did not involve a summary dismissal of a habeas petition. It dealt with a full written opinion. *Id.*, at 258. Footnote 12 dealt with an issue not presented in the case before the Court.

Chief Justice Marshall long ago cautioned against putting too much weight on dicta. "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided but their possible bearing on other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821). As the *Harris* Court was not presented with the situation in the present case, it was not confronted with the ramifications of requiring state courts to comply with this "one-line" requirement. In using this dictum from *Harris*, the Ninth Circuit failed to appreciate the burdens this would place on the California Supreme Court. The dictum in *Harris* should not be used to bring about the effective abrogation of procedural bar in California.

California's inability to enforce its procedural rules will raise other problems. One reason to enforce procedural default is to discourage " 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Wainwright* v. *Sykes*, 433 U. S. 72, 89 (1977). The Ninth Circuit's decision in the present case runs the risk of encouraging this practice because of the ease with which procedural default can be overcome. The California Supreme Court only has to issue one summary denial of an original habeas petition without mentioning procedural default for California to be prevented from using procedural default in any federal habeas corpus action. If the California Supreme Court does not comply with the dictates of the Ninth Circuit, then sandbagging becomes even easier for defendants. The Ninth Circuit will refuse to enforce procedural default against California defendants and they will therefore be able to omit claims in state court without the risk of losing them. Thus the problem with *Fay* v. *Noia*, 372 U. S. 391 (1963) that this Court cured in *Sykes* will once again plague a state.

Once criminal defendants can bypass state courts this easily, other principles that procedural default protects are at risk. A state's comity interest in being able to litigate a claim first will be compromised if a criminal defendant can omit a claim in the state courts and subsequently raise it in federal courts through habeas corpus. See *Engle* v. *Isaac*, 456 U. S. 107, 128-129 (1982).

The finality of state convictions is similarly endangered. If a defendant can hold back a constitutional claim or two without the risk of losing them, then he can perpetuate his criminal proceeding beyond its natural course by holding back a few claims for habeas corpus in federal court. "Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis*, *supra*, 411 U. S., at 241.

Harris v. *Reed*, 489 U. S. 255, 264 (1989) was decided with the understanding that the interests supported by procedural default such as federalism, comity, and finality would not be harmed. The Ninth Circuit, however, by blindly applying one piece of dicta from *Harris*, threatens these interests. If the procedural default doctrine is to retain any force by its centennial, cf. *In re Wood*, 140 U. S. 278 (1891), then the decision of the Ninth Circuit must be reversed.

II. Summary denial of discretionary jurisdiction is not "the last state court judgment" under *Harris* v. *Reed*.

In *Harris* v. *Reed*, 489 U. S. 255, 263 (1989), the Court held that "procedural default does not bar consideration of a federal claim on direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly " ' states that its judgment rests on a state procedural bar." The Ninth Circuit read this to include the California Supreme Court's summary denial of defendant's successive habeas petition. *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1203 (9th Cir. 1990). This decision ignores the realities behind the California Supreme Court's decision to summarily deny an original habeas corpus petition. When the California Supreme Court summarily denied defendant's successive habeas petition without opinion, it simply exercised its discretion to decline to take a case. This is similar to this Court's summary denial of a certiorari petition or an original habeas corpus petition. Each has no meaning beyond the decision not to take a case. Thus a denial by the California Supreme Court is not meaningful enough to qualify as the "last state court judgment" under *Harris*.

Part of the Ninth Circuit's reasoning behind its holding was its belief that the California Supreme Court's original jurisdiction over defendant's habeas corpus action was not discretionary. See *Nunnemaker*, *supra*, 896 F. 2d, at 1203-1204, n. 4. This reasoning misunderstands the California Supreme Court's role in adjudicating habeas corpus petitions.

While the California Supreme Court, along with the courts of appeal, and superior courts has original jurisdiction in habeas proceedings, Cal. Const. art IV, § 10, the high court's jurisdiction is discretionary, not mandatory.

> "The work of the Supreme Court consists primarily of determining what cases the court will review and deciding those cases by written opinions after holding oral argument.
>
> "Appeals in all death penalty cases are automatically taken to the Supreme Court. Other cases normally come before the court either in the form of petitions for review of decisions by the Courts of Appeal or as petitions for extraordinary writs of mandate, prohibition, certiorari, *or habeas corpus. In these cases, the court must decide whether to accept the matter for decision*." Supreme Court of California, *Practices and Procedures* 13 (1990 rev.) (emphasis added).

A prisoner is expected to file his initial habeas petition in superior court, if he starts in appellate court, the appellate court is likely to dismiss the petition. See *In re Hillery*, 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 359 (1962). The process by which a habeas petition makes its way from the superior court to the California Supreme Court is discussed at length in the petition for certiorari in the present case. See Pet. 21-26. Briefly, when a prisoner's habeas petition is denied, he must file a successive petition in the next higher court. If the petition is denied by the Court of Appeal, the prisoner has the option by statute of either filing a successive petition in the Supreme Court or filing a petition for review. Cal. Pen. Code §§ 1475, 1506.[6] When the Court of Appeal has taken briefing

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6. A petition for review is analogous to a petition for certiorari in this Court and is granted or denied for similar reasons. Compare Cal. Rules of Court rule 29(a)(1) with Rules of the Supreme Court rule 10.1. The term "having"rather than "review" in section 1506 is a leftover from earlier law. See generally 9 B. Witkin, *California Procedure, Appeals* §§ 692, 693 (3d ed. 1985).

and argument and rendered an opinion, however, the California Supreme Court has disapproved the successive writ practice and required a petition for review. See *In re Michael E.*, 15 Cal. 3d 183, 193, n. 15, 538 P. 2d 231 (1975).

The *Michael E.* rule reinforces the discretionary nature of the habeas petition in the California Supreme Court. The California Supreme Court would not require a prisoner to take the discretionary route of appellate review in lieu of a course which would give him a decision on the merits as a matter of right. The conclusion necessarily follows that an original habeas petition is treated as a request for discretionary review.

The decision of the Ninth Circuit regarding the law of a state within its jurisdiction is entitled to respect. The views of a state's high court on state law, however, are dispositive. See *Wainwright* v. *Goode*, 464 U. S. 78, 84 (1983). As the California Supreme Court treats its *decision* as whether to consider an original habeas petition discretionary, this binds the federal courts.

This Court treats original habeas petitions in a similar manner. This Court shares original habeas jurisdiction with the district courts and circuit courts. 28 U. S. C. § 2241(a). This is discretionary jurisdiction. *Ex parte Abernathy*, 320 U. S. 219, 220 (1943) (per curiam). Given the demands placed on this Court's resources, it will consider an original habeas petition only under extraordinary circumstances. See *ibid.* "These writs are rarely granted." Supreme Court Rule 20.4(a). Summary denial is not a ruling on the merits. *Abernathy*, *supra*, 320 U. S., at 220.[7]

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7. Once a habeas petition has gone through the lower federal courts, it is subject to this Court's certiorari jurisdiction. See R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, § 11.3 at 510 (6th ed. 1986). Thus this Court rarely hears original habeas petitions. *Id.*, at 508.

A summary denial of a habeas petition by the California Supreme Court is also similar to this Court's denial of a petition for certiorari. In each instance, a jurisdiction's highest court decides not to decide a particular case. In each instance, the decision is usually announced without providing any reasons for the decision. Finally, in each instance, the decision has no precedential value beyond the fact that jurisdiction was not extended to that particular case. By considering this summary denial by the California Supreme Court to be "the last state court judgment" under *Harris* v. *Reed*, *supra*, the Ninth Circuit made something out of nothing.[8]

This Court has repeatedly stated that its denial of a petition for certiorari has no bearing on the merits of the case. See, *e.g.*, *United States* v. *Carver*, 260 U. S. 482, 490 (1923). This rule is not a matter of choice, it is necessary for this Court to function properly with its large docket. Reading any meaning into this Court's denial of certiorari would undermine this Court's control of its docket. The leading exponent of this position has been Justice Frankfurter. In a series of opinions, concurrences, and dissents, he has set out the reasons why no meaning can be read into a high court's summary refusal to accept a case.

In *Brown* v. *Allen*, 344 U. S. 443, 497 (1953), a majority of the Court held that a denial of certiorari has no bearing on subsequent habeas corpus proceedings in federal court.[9] This holding was based on this Court's treatment of a denial of certiorari. Certiorari jurisdiction was functional, and thus was treated in view of what it was intended to accomplish. *Id.*, at 491. Certiorari was designed to allow this Court to control its

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8. A somewhat different practice now prevails in capital cases, where the habeas petition is considered concurrently with the direct, automatic appeal. See Supreme Court Policies Regarding Cases Arising From Judgments of Death, 50 Cal.3d, Advance Sheets, Rules 1, May 22, 1990. As this is not a capital case, this variation need not be considered here.

9. Justice Frankfurter's opinion is the majority opinion on this point only. See *id.*, at 452.

docket, allowing it to keep to manageable proportions the number of cases it decided. *Ibid.* Therefore, decisions on whether to grant certiorari did not turn on whether a particular decision was correct, but on the importance of the issues involved. *Ibid.*; see also Supreme Court Rule 10.1.

This functional approach dictated the treatment of a denial of certiorari.

> "We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard." *Brown, supra*, 344 U. S., at 492.

Thus a district judge should not discern hidden meanings from this Court's denial of certiorari. The lower court rarely knows what happened in the certiorari proceeding. *Ibid.* It usually has different records before it than this Court had. *Id.*, at 494-495. Even if the District Court had the same record it would not help it discern this Court's motives. See *id.*, at 495. "To say that he [the District Court judge] is at liberty to decide whether we passed on the merits of a case invites what must, in almost all cases, be idle speculation." *Ibid.*

Allowing district courts to read meaning into a denial of certiorari had too much potential for mischief. If district courts could deny a habeas petition simply because certiorari had been denied, then the scope of habeas corpus jurisdiction would be left to their unbounded discretion. *Ibid.* They would be deciding "on the most fragile foundations" which do no more than offer "a shelter for district judges to respond according to the individual will." Therefore, to prevent "judicial impressionism" a denial of certiorari could not be "interpreted as an 'expression of an opinion on the merits.' " *Id.*, at 497.

One reason why a denial of certiorari has no precedential value is that no reasons for denying certiorari are given by this

Court. See *id.*, at 492. The reasons for this practice were enunciated by Justice Frankfurter in an opinion with respect to a denial of certiorari in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917-918 (1950).

> "The sole significance of such denial of a petition for writ of certiorari need not be elucidated to those versed in the Court's procedures. It simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' Rule 38, paragraph 5. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. . . . Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

The denial of certiorari must have no meaning "unless the whole conception of certiorari in relation to the business of this Court is to be radically transformed." *Darr* v. *Burford*, 339 U. S. 200, 226 (1950) (Frankfurter, J., dissenting).[10] The heavy demands on this Court's resources require it to be able to dispose of the bulk of its docket with a minimum of effort. Having this Court give its reasons for denying each unsuccessful petition for certiorari would place too heavy a burden on its resources. "Divergent and contradictory reasons often operate as to the same petition and lead to a common vote for denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given. *Id.*, at 227." Furthermore, if a denial is to have the effect of an opinion on the merits then it must be dealt with as an opinion on the merits. Turning each denial of certi-

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10. *Darr* was overruled on a related point in *Fay* v. *Noia*, 372 U. S. 391, 435-436 (1963).

orari into a miniature opinion would be impossible. *Id.*, at 228.

The damage that would be done by reading meaning into this Court's denial of certiorari is similar to the damage done in California by the Ninth Circuit's opinion. The California Supreme Court, like this Court, is confronted every year with a large docket of cases. Summary denial of a petition for habeas corpus is necessary for the California Supreme Court to keep control of its docket.[11] A habeas petition can be summarily denied for many reasons. It may fail on the merits, it may be successive, see Cal. Pen. Code § 1475, it may need to be raised in a lower court first, see *In re Hillery*, *supra*, 202 Cal. App. 2d, at 294, it may not raise issues worthy of the court's attention, or it could raise procedurally barred claims. See *In re Wells*, 67 Cal. 2d 873, 875, 434 P. 2d 613 (1967).

As a habeas corpus petition frequently will raise many claims and, as there could be different reasons for dismissing each claim, a summary dismissal of a habeas petition is likely to involve many different issues. Uniting the views of the justices on these disparate issues would at least equal the task of getting this Court to agree on its reasons for denying certiorari. Cf. *Darr*, *supra*, 339 U. S., at 227 (Frankfurter, J., dissenting).

The Ninth Circuit's decision to read meaning into the California Supreme Court's summary denial of defendant's successive habeas petition contradicts this Court's analysis of the effect of such denials. 28 U. S. C. § 1257 provides that this Court's review of state court judgments and decrees relates only to those judgments and decrees rendered "by the highest court of a state, in which a decision could be had." An issue that arises under this statute is which court to issue certiorari to when a state intermediate appellate court decides the case and the state high court declines to review the decision. This Court has consistently held that a denial of discretionary review is not the relevant decision under 28 U. S. C. § 1257. Thus in *American Railway Exp. Co.* v. *Levee*, 263 U. S. 19, 20-

11. See Part I. B., *supra*, at 7-14.

21 (1923), the Court found that when a state high court declined discretionary review of the decision of the state intermediate appellate court, the lower court's decision, not the denial of review, was the relevant decision for certiorari purposes. What counts is an actual decision of the case by a court, not a decision not to accept the case. See *Primoda* v. *McGaughtry*, 910 F.2d 1379, 1382-1383 (7th Cir. 1990) (criticizing the Ninth Circuit's opinion in the present case).

R. J. Reynolds Tobacco Co. v. *Durham County*, 479 U. S. 130 (1986) provides an informative contrast. North Carolina gives, with few exceptions, a litigant "an appeal of right to its Supreme Court from any decision of its Court of Appeals that 'directly involves a substantial question arising under the Constitution of the United States or of this State.' " *Id.*, at 138. The North Carolina Supreme Court had granted Durham County's motion to dismiss Reynolds' appeal from a decision of the North Carolina Court of Appeals for a lack of a substantial constitutional question. *Id.*, at 136. The issue in *R. J. Reynolds* was which decision was the last decision by a state court for the purposes of 28 U. S. C. § 1257: the decision of the Court of Appeals, or the dismissal of the appeal by the North Carolina Supreme Court. *Id.*, at 138.

The *Reynolds*' Court noted that there was no authority on the effect of such a dismissal. *Id.*, at 138, n. 6. Furthermore, the state rule required that a judgment about the merits of the question be made before the court could decide whether its jurisdiction was mandatory or discretionary. *Id.*, at 139. The California Supreme Court's decision to accept a habeas case is discretionary, however.[12] Thus the summary denial of a habeas petition is like the summary denial of review in *American Railway Exp. Co.*, *supra*, and would not be a judgment or decree under 28 U. S. C. § 1257.

A summary denial of a habeas petition stands for nothing more than the fact that the California Supreme Court did not

12. See part II., *supra*, at 15-16.

believe that the case warranted supreme court review. Cf. *Brown*, *supra*, 344 U. S., at 492; *Ex parte Tracy*, 249 U. S. 551-552. By reading additional meaning into the California Supreme Court's summary denial of defendant's successive habeas petition, the Ninth Circuit "transform[s] a mechanism for keeping cases out of [the California Supreme Court] into a means of bringing them in." *Darr*, *supra*, 339 U. S., at 227-228 (Frankfurter, J., dissenting). The California Supreme Court has sufficient work without having a federal court tell it to render mini-opinions on nearly a thousand habeas petitions every year.[13] The *Harris* Court recognized that state courts do not need extra burdens by limiting the decision to "the last state court rendering a *judgment* in the case . . . . " *Harris*, *supra*, 489 U. S., at 263 (emphasis added). The summary, unarticulated refusal of the California Supreme Court to further consider defendant's habeas petition cannot be such a judgment.

III. The summary denial by a court of an attempt to relitigate a previously litigated issue should not be considered an intervening "judgment" under *Harris* v. *Reed*.

While amicus submits that the California Supreme Court's decision to summarily deny a habeas corpus petition is an exercise of discretionary jurisdiction,[14] even if this action was more than a decision not to take a case, see *Nunnemaker* v. *Ylst*, 896 F. 2d 1200, 1203, n. 4 (9th Cir. 1990), it still should not be considered "the last state court rendering a judgment in the case . . . " under *Harris* v. *Reed*, 489 U. S. 255, 263 (1989). *Harris* is not a ritual that state courts must constantly invoke to appease federal courts. It is a common sense rule designed to solve the problem of ambiguous state court *decisions* with a minimum of discretion on the part of federal courts. By focusing on the result instead of the last decision by the California

13. See part I. B., *supra*, at 7-14.

14. See part II., *supra*, at 15-16.

judiciary, the Ninth Circuit turns *Harris* into an expensive ritual for state courts to heed.[15]

The *Harris* Court was confronted with an unclear decision of an Illinois appellate court. On Harris' petition for post conviction relief, the Appellate Court of Illinois had to deal with an ineffective assistance of counsel claim that had not been raised at his direct appeal.[16] *Id.*, at 257. The Appellate Court dealt with this in two ways. First it noted "the 'well-settled' principles of Illinois law that 'those [issues] which could have been presented [on direct appeal] but were not, are considered waived.' " *Id.*, at 258. It further found that with one exception Harris could have raised all of his ineffective assistance claims on appeal. *Ibid.* The problem was that the Appellate Court also rejected all of Harris' ineffective assistance claims on the merits. *Ibid.*

Federal courts had to decide whether Harris' ineffective assistance claims were procedurally barred when there was no clear answer from the Appellate Court. The *Harris* Court recognized that it needed to supply the answer. *Id.*, at 259-260. The answer came in the form of applying the "plain statement rule" of *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983) to the last decision of the state court. *Harris*, *supra*, 489 U. S., at 265.

Long, like *Harris*, reviewed a state court opinion that rested on both state and federal grounds. *Long*, *supra*, 463 U. S., at 1043. The court was dissatisfied with its previous independent state grounds decisions. Some required the court "to interpret state laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed by the parties." *Id.*, at 1039. Its practice of vacation and continuance for clari-

15. See part I. B., *supra*, at 7-14.

16. Harris did not seek review in the Illinois Supreme Court of the Appellate Court's decision. Thus the last decision of any kind in *Harris* before federal habeas was the decision of the Appellate Court. See *id.*, at 258.

fication, see *e.g.*, *Herb* v. *Pitcairn*, 324 U. S. 117 (1945), was also unsatisfactory as it placed too great a burden of compliance on the state courts. *Long*, *supra*, 463 U. S., at 1040-1041.

The *Long* Court solved this problem by presuming that a state court decision relied on federal law "when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Id.*, at 1039-1040. The *Long* Court did not abandon independent state grounds. It simply avoided having this Court decipher ambiguous state court opinions. *Id.*, at 1041. It accomplished this by raising a presumption of federal grounds. *Id.*, at 1042.

The problem faced in *Harris* and *Long* is not the problem in the present case. In *Harris* no state court made a clear finding of procedural default. See *Harris*, *supra*, 489 U. S., at 257-258. The present case, however, has seen the litigation of the procedural default issue by the California judiciary. The California Court of Appeal provided a clear, uncontradicted statement of procedural default. "Although the record is silent as to whether defendant was timely advised of such rights [under *Miranda*], the failure to interpose an objection during trial precludes our consideration on appeal." Pet., Appendix C, at A-41.

The fact that the California Supreme Court made no statement in its last summary denial of defendant's attempt to relitigate this issue adds no uncertainty to the California Court of Appeal's finding of procedural default. The problem in *Harris* was that no clear statement of procedural default existed. Here, there is such a statement. Applying the *Harris* rule to the non-statement of the California Supreme Court, when a clear statement of procedural default had already been made earlier in the litigation, creates uncertainty where none exists. *Harris*, like *Long*, is intended to keep federal courts from deciphering state court opinions, not to conjure something out of nothing. See *Long*, *supra*, 463 U. S., at 1041; *Harris*, *supra*, 489 U. S., at 264-265.

This is underscored by this Court's treatment of an analogous situation under *Long*. In *Michigan* v. *Chesternut*, 486

U. S. 567, 570-572 (1988), a state appellate court rendered a decision which the state high court declined to review. The *Chesternut* Court looked to the decision of the Michigan Court of Appeals to determine whether independent state constitutional grounds existed to uphold the result. *Id.*, at 571, n. 3. The fact that the Michigan Supreme Court declined to review the appellate court's decision had no bearing on this Court's analysis of the *Long* issue. The *Chesternut* Court could have treated the Michigan Supreme Court's summary denial of petitioner's leave to appeal in the same manner that the Ninth Circuit treated the California Supreme Court's summary denial of a habeas petition. It could have taken the order of the Michigan Supreme Court to be the relevant decision under *Long*, and, finding no express statement of independent state grounds in the summary denial, proceeded to deal with the merits of the case. Instead, the *Chesternut* Court looked to the last *opinion* of a Michigan court.

Long was developed to help this Court determine "whether various forms of references to state law constitute adequate and independent state grounds . . . . " *Long*, *supra*, 463 U. S., at 1038. The *Chesternut* Court applied the underlying premise of *Long* that it was meant to interpret the last relevant opinion of a state court. *Chesternut*, *supra*, 486 U. S., at 571, n. 3. The *Harris* Court found itself faced with the same problem as the *Long* Court. *Harris*, *supra*, 489 U. S., at 262-263. Faced with a common problem, it adopted a common solution. *Id.*, at 263. But this case presents the same problem as *Chesternut*. Therefore, as in *Chesternut*, a court analyzing a *Harris* issue should look to the last opinion on the procedural default issue.[17]

Harris was not intended to change the administration of procedural default. See *Harris*, *supra*, 489 U. S., at 264. It was meant to prevent federal courts from having to undergo the

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17. A different situation is presented when a summary dismissal is the first court action which follows the default. That question is not presented here, but is presented in *Coleman* v. *Thompson*, No. 89-7662. Amicus intends to discuss this issue further in that case.

time consuming task of interpreting ambiguous state court statements regarding procedural default. See *id.*, at 264-265. Here, no such ambiguity existed. There was a clear finding of procedural default, uncontradicted by any future litigation. Explicit adoption of the approach which was implicit in *Chesternut* will restore much needed order to procedural default.

The correct rule, amicus submits, is this. When a state court has made a plain statement satisfying *Harris* v. *Reed*, subsequent summary dispositions are not intervening "judgments" within the meaning of *Harris* unless they decide the procedurally defaulted issue on the merits without reaffirming the previous finding of procedural default.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

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